

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ROY A.,

Plaintiff.

V.

KILOLO KITJAKZI, Acting
Commissioner of Social Security

Defendant.

NO. 4:23-CV-5055-TOR

ORDER AFFIRMING COMMISSIONER'S DENIAL OF BENEFITS UNDER TITLE II OF THE SOCIAL SECURITY ACT

BEFORE THE COURT is Plaintiff's motion for judicial review of

Defendant's denial of his application for Title II disability benefits under the Social Security Act (ECF No. 5). This matter was submitted for consideration without oral argument. The Court has reviewed the administrative record, the completed briefing, and is fully informed. For the reasons discussed below, the Commissioner's denial of Plaintiff's application for benefits under Title II of the Social Security Act is **AFFIRMED**.

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ORDER AFFIRMING COMMISSIONER'S DENIAL OF BENEFITS UNDER
TITLE II OF THE SOCIAL SECURITY ACT ~ 1

JURISDICTION

The Court has jurisdiction under 42 U.S.C. §§ 405(g), 1383(c)(3).

STANDARD OF REVIEW

A district court’s review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited: the Commissioner’s decision will be disturbed “only if it is not supported by substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1153, 1158-59 (9th Cir. 2012) (citing 42 U.S.C. § 405(g)). “Substantial evidence” means relevant evidence that “a reasonable mind might accept as adequate to support a conclusion.” *Id.* at 1159 (quotation and citation omitted). Stated differently, substantial evidence equates to “more than a mere scintilla[,] but less than a preponderance.” *Id.* (quotation and citation omitted). In determining whether this standard has been satisfied, a reviewing court must consider the entire record as a whole rather than searching for supporting evidence in isolation. *Id.*

In reviewing a denial of benefits, a district court may not substitute its judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001). If the evidence in the record “is susceptible to more than one rational interpretation, [the court] must uphold the ALJ’s findings if they are supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an

1 ALJ's decision on account of an error that is harmless." *Id.* An error is harmless
2 "where it is inconsequential to the [ALJ's] ultimate nondisability determination."
3 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ's
4 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*
5 *Sanders*, 556 U.S. 396, 409-10 (2009).

6 **FIVE STEP SEQUENTIAL EVALUATION PROCESS**

7 A claimant must satisfy two conditions to be considered "disabled" within
8 the meaning of the Social Security Act. First, the claimant must be "unable to
9 engage in any substantial gainful activity by reason of any medically determinable
10 physical or mental impairment which can be expected to result in death or which
11 has lasted or can be expected to last for a continuous period of not less than twelve
12 months." 42 U.S.C. § 423(d)(1)(A). Second, the claimant's impairment must be
13 "of such severity that he is not only unable to do his previous work[,] but cannot,
14 considering his age, education, and work experience, engage in any other kind of
15 substantial gainful work which exists in the national economy." 42 U.S.C. §
16 423(d)(2)(A).

17 The Commissioner has established a five-step sequential analysis to
18 determine whether a claimant satisfies the above criteria. See 20 C.F.R. §
19 404.1520(a)(4)(i)–(v). At step one, the Commissioner considers the claimant's
20 work activity. 20 C.F.R. § 404.1520(a)(4)(i). If the claimant is engaged in

1 “substantial gainful activity,” the Commissioner must find that the claimant is not
2 disabled. 20 C.F.R. § 404.1520(b).

3 If the claimant is not engaged in substantial gainful activities, the analysis
4 proceeds to step two. At this step, the Commissioner considers the severity of the
5 claimant’s impairment. 20 C.F.R. § 404.1520(a)(4)(ii). If the claimant suffers
6 from “any impairment or combination of impairments which significantly limits
7 [his or her] physical or mental ability to do basic work activities,” the analysis
8 proceeds to step three. 20 C.F.R. § 404.1520(c). If the claimant’s impairment
9 does not satisfy this severity threshold, however, the Commissioner must find that
10 the claimant is not disabled. *Id.*

11 At step three, the Commissioner compares the claimant’s impairment to
12 several impairments recognized by the Commissioner to be so severe as to
13 preclude a person from engaging in substantial gainful activity. 20 C.F.R. §
14 404.1520(a)(4)(iii). If the impairment is as severe, or more severe than one of the
15 enumerated impairments, the Commissioner must find the claimant disabled and
16 award benefits. 20 C.F.R. § 404.1520(d).

17 If the severity of the claimant’s impairment does meet or exceed the severity
18 of the enumerated impairments, the Commissioner must pause to assess the
19 claimant’s “residual functional capacity.” Residual functional capacity (“RFC”),
20 defined generally as the claimant’s ability to perform physical and mental work

1 activities on a sustained basis despite his or her limitations (20 C.F.R. §
2 404.1545(a)(1)), is relevant to both the fourth and fifth steps of the analysis.

3 At step four, the Commissioner considers whether, in view of the claimant's
4 RFC, the claimant is capable of performing work that he or she has performed in
5 the past ("past relevant work"). 20 C.F.R. § 404.1520(a)(4)(iv). If the claimant is
6 capable of performing past relevant work, the Commissioner must find that the
7 claimant is not disabled. 20 C.F.R. § 404.1520(f). If the claimant is incapable of
8 performing such work, the analysis proceeds to step five.

9 At step five, the Commissioner considers whether, in view of the claimant's
10 RFC, the claimant is capable of performing other work in the national economy.
11 20 C.F.R. § 404.1520(a)(4)(v). In making this determination, the Commissioner
12 must also consider vocational factors such as the claimant's age, education and
13 work experience. *Id.* If the claimant is capable of adjusting to other work, the
14 Commissioner must find that the claimant is not disabled. 20 C.F.R. §
15 404.1520(g)(1). If the claimant is not capable of adjusting to other work, the
16 analysis concludes with a finding that the claimant is disabled and is therefore
17 entitled to benefits. *Id.*

18 The claimant bears the burden of proof at steps one through four above.
19 *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2009). If the
20 analysis proceeds to step five, the burden shifts to the Commissioner to establish

1 that (1) the claimant is capable of performing other work; and (2) such work
2 “exists in significant numbers in the national economy.” 20 C.F.R. § 416.1560(c);
3 *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

4 **ALJ’s FINDINGS**

5 On December 3, 2020, Plaintiff applied for Title II disability and disability
6 insurance benefits, alleging on onset date of October 1, 2020. Administrative
7 Transcript (“Tr.”) ECF No. 4 at 22. Plaintiff generally alleged that he was disabled
8 due to chronic back pain as a result of prior fracture and spinal fusion, sleep
9 disorder, posttraumatic stress disorder, depressive disorder, hypertension,
10 hypogonadism, and sinusitis. Tr. 26, 36. The application was initially denied on
11 July 2, 2021, and then upon reconsideration on January 6, 2022. Tr. 22. Prior to
12 the hearing, Plaintiff requested a physiological examination through a state agency,
13 which the Administrative Law Judge (“ALJ”) denied, finding the record to be
14 adequate with respect to examinations conducted by prior practitioners. Tr. 22.
15 By mutual agreement, the ALJ conducted a telephonic hearing on November 17,
16 2022, with Dr. William Biles appearing as a medical expert, and Mr. Clinton
17 Richmond appearing as a vocational expert. Tr. 22. The ALJ denied Plaintiff’s
18 claim on December 9, 2022. *See generally*, Tr. 22-43. Plaintiff’s claim was
19 denied on appeal on March 17, 2023. Tr. 6.

20 In denying Plaintiff’s claim, the ALJ found that Plaintiff had earned \$13,121

1 in the fourth quarter of 2020, but that such income may reasonably reflect earnings
2 prior to the alleged date of onset. Tr. 25. Additionally, the ALJ noted that Plaintiff
3 had received unemployment benefits during the second quarter of 2020, and from
4 the second through the fourth quarter of 2021. Tr. 25. While unemployment
5 benefits do not qualify as substantial gainful employment, in order to receive such
6 benefits, claimants are required to verify their attempts to seek employment and are
7 required to affirm that they are physically able and available for work each day.
8 Tr. 25. The ALJ ultimately determined that there had been a continuous 12-month
9 period during which Plaintiff did not engage in substantial gainful activity. Tr. 25.

10 At step two, the ALJ determined that Plaintiff had the following severe
11 impairments: chronic back pain, sleep disorder, posttraumatic stress disorder
12 (“PTSD”), and depressive mood disorder. Tr. 25. The ALJ found that the
13 following impairments were not a significant limitation on Plaintiff’s ability to
14 perform basic work activities: hypertension, hypogonadism, and sinusitis. Tr. 26.

15 At step three, the ALJ determined that neither Plaintiff’s severe
16 impairments, nor a combination of severe and non-severe impairments met or
17 medically equaled the severity as required by 20 CRF 404.1520(d), 404.1525, and
18 404.1526. Tr. 26. In making this determination, the ALJ considered that Plaintiff
19 has not required assistance such as a cane, walker, or crutches when walking and
20 has not required more than three hospitalizations within a 12-month period at least

1 30 days apart per the requirements of listing 1.15 under 20 C.F.R. § Pt. 404,
2 Subpart P, App. 1. The ALJ additionally found that Plaintiff did not establish that
3 his mental impairment met two marked levels or one extreme level, such that
4 Plaintiff has limitations in: understanding, remembering, or applying information;
5 interacting with others, concentrating, persisting, or maintaining pace; or adapting
6 or managing oneself. TR. 26. The ALJ found that Plaintiff has a mild limitation in
7 remembering and applying information, a moderate limitation in interacting with
8 others, a moderate limitation with respect to concentrating, persisting, or
9 maintaining pace, and a moderate limitation in adapting or managing himself. Tr.
10 27-8. Additionally, the ALJ noted that Plaintiff had failed to submit evidence of a
11 medically documented history of a disorder of at least two years and both “(1)
12 medical treatment, mental health therapy, psychological support, or a highly
13 structured setting that is ongoing and that diminishes the signs and symptoms of
14 the mental health disorder and (2) minimal capacity to adapt to changes in the
15 claimant’s environment or to demands that are not already part of the claimant’s
16 daily life.” Tr. 28.

17 Because Plaintiff’s impairments did not meet or exceed the requirement of
18 severity, the ALJ considered his RFC. The ALJ found that the record supported
19 Plaintiff was capable of light work under 20 CFR 404.1567(b), but can never climb
20 ladders, ropes, or scaffold, and must avoid all hazards. Tr. 28. Further, the ALJ

1 determined that Plaintiff is capable of routine tasks for two-hour intervals between
2 regularly scheduled breaks, but must have non-collaborative interactions with
3 others. Tr. 28. In making a determination at step three, the ALJ noted that
4 Plaintiff's allegations of impairment were not consistent with the level of disability
5 he claimed, but found that evidence supported a reduced residual functional
6 capacity. Tr. 35.

7 At step four, the ALJ found that the Plaintiff is unable to perform his past
8 relevant work as a medical equipment repairer. Tr. 35.

9 At step five, the ALJ determined that Plaintiff is able to perform work in the
10 national economy based on his age, education, work experience, and residual
11 functional capacity. Tr. 36. At the hearing, the vocational expert determined that
12 jobs such as router, housekeeping cleaner, and marker, exist in great numbers in
13 the national economy and Plaintiff would be able to perform them given his
14 residual functional capacity. Tr. 36-7.

15 Given the steps above, the ALJ determined that Plaintiff was not disabled.

16 ISSUES

17 Plaintiff seeks judicial review of the Commissioner's final decision denying
18 his application for Title II disability and disability insurance. Plaintiff raises the
19 following issues on review:

20 //

- 1 I. Whether the ALJ erred in considering evidence presented from
2 doctors, nurse practitioners, and a physical therapist as it relates
3 to Plaintiff's impairments and his ability to work, including
4 PTSD, sleep disorders, and back pain.
- 5 II. Whether the ALJ's RFC finding is supported by substantial
6 evidence.

5 ECF No. 5 at 1.

6 DISCUSSION

7 **I. The ALJ's consideration of evidence presented by doctors, 8 nurse practitioners, and a physical therapist.**

9 Plaintiff contends that the ALJ erred by "rejecting and ignoring opinions from
10 multiple medical providers and a physical therapist." ECF No. 5 at 7.

11 Specifically, the Plaintiff alleges that the ALJ erred in rejecting the opinions and
12 evidence presented from Dr. Cheta Nand, Sara Stewart, ARNP, Dr. Marie Carmel
13 Desire with Dr. Farrukh Hashmi, and examinations conducted by Johnny Liner,
14 NP, and Rod Strom, physical therapist. ECF No. 5 at 8, 11, 13, and 16.

15 As Plaintiff's alleged onset date was October 1, 2020, the new regulations for
16 how an ALJ must evaluate medical opinion evidence under Titles II is controlling.

17 See 20 C.F.R. § 404.1520c (governing medical opinion evidence under Title II);
18 Revisions to Rules Regarding the Evaluation of Medical Evidence, 82 Fed. Reg.
19 5844-01 (Jan. 18, 2017), available at 2017 WL 168819. An ALJ must consider
20 and evaluate the persuasiveness of all medical opinions or prior administrative

1 medical findings from medical sources. 20 C.F.R. §§ 404.1520c(a)–(b). The
2 factors for evaluating the persuasiveness of medical opinions and prior
3 administrative medical findings include; supportability, consistency, relationship
4 with the claimant, specialization, and “other factors that tend to support or
5 contradict a medical opinion or prior administrative medical finding,” including
6 but not limited to “evidence showing a medical source has familiarity with the
7 other evidence in the claim or an understanding of our disability program’s policies
8 and evidentiary requirements.” 20 C.F.R. §§ 404.1520c(c)(1)–(5).

9 The ALJ is required to explain how the two most important factors,
10 supportability and consistency, were considered. 20 C.F.R. § 404.1520c(b)(2).
11 These factors are defined as follows:

12 (1) Supportability. The more relevant the objective medical evidence
13 and supporting explanations presented by a medical source are to
14 support his or her medical opinion(s) or prior administrative medical
finding(s), the more persuasive the medical opinions or prior
administrative medical finding(s) will be.

15 (2) Consistency. The more consistent a medical opinion(s) or prior
16 administrative medical finding(s) is with the evidence from other
17 medical sources and nonmedical sources in the claim, the more
persuasive the medical opinion(s) or prior administrative medical
finding(s) will be.

18 20 C.F.R. § 404.1520c(c)(1)-(2).

19 The ALJ may, but is not required to, explain how “the other most persuasive
20 factors in paragraphs (c)(3) through (c)(5)” were considered. 20 C.F.R. §§

1 404.1520c(b)(2). However, where two or more medical opinions or prior
2 administrative findings “about the same issue are both equally well-supported ...
3 and consistent with the record ... but are not exactly the same,” the ALJ is required
4 to explain how “the most persuasive factors” were considered. 20 C.F.R. §§
5 404.1520c(b)(2).

6 These regulations displace the Ninth Circuit’s standard that require an ALJ
7 to provide “specific and legitimate” reasons for rejecting an examining doctor’s
8 opinion. *Woods v. Kijakazi*, 32 F.4th 785, 787 (9th Cir. 2022).

9 *A. Dr. Cheta Nand*

10 Plaintiff asserts that the ALJ improperly rejected as conclusory a letter
11 written by Dr. Nand discussing Plaintiff’s ability to perform work on a consistent
12 basis. ECF No. 5 at 11. In the December 2021 letter, Dr. Nand described the
13 various sleep disorders for which he has treated Plaintiff since 2016, and how they
14 affect his ability to perform work. ECF No. 4 at 829. He discussed how Plaintiff’s
15 sleep apnea, narcolepsy, hypersomnia, and insomnia have been confirmed by sleep
16 analysis testing, including a sleep analysis test done at Pinnacle Sleep and Wake
17 Disorder Center in 2016, and are supported by the Department of Veteran Affairs
18 (“VA”) findings. *Id*; ECF No. 4 at 1042. According to Dr. Nand, Plaintiff has
19 difficulty falling asleep and tolerating his CPAP due to “mental health conditions.”
20 *Id*. Ultimately, Dr. Nand stated that, in his medical opinion, Plaintiff’s conditions

1 relating to sleep have “deteriorated to the point that he has not been able to sustain
2 full-time work since October 2020.” *Id.*

3 Plaintiff argues that the ALJ selectively cited to a singular line of Dr. Nand’s
4 letter and disregarded the evidence in the record, including from the VA, that
5 supports the conclusions Dr. Nand reaches. ECF No. 5 at 1. The ALJ’s
6 determination that Dr. Nand’s letter is not persuasive is supported by 20 C.F.R. §
7 404.1520b. ““The administrative law judge is not bound by the uncontroverted
8 opinions of the claimant’s physicians on the ultimate issue of disability, but he
9 cannot reject them without presenting clear and convincing reasons for doing so.””

10 *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (quoting *Matthews v.*
11 *Shalala*, 10 F.3d 678 (9th Cir.1993)). The ALJ concluded that the letter contained
12 no function-by-function analysis of the Plaintiff’s ability to perform work tasks,
13 and thus is justified in rejecting Dr. Nand’s opinion on the ultimate issue of fact as
14 not helpful to the overall determination and as a question left to the Commissioner.

15 Further, Dr. Nand’s letter references the sleeping analysis testing that
16 Plaintiff underwent but does not connect the findings of the ultimate disability to
17 the results of the sleep study. ECF No. 4 at 829. Both Dr. Nand’s letter and
18 Plaintiff argue that Plaintiff’s alleged disability associated fatigue from his sleep
19 disorder is supported by the VA’s recognition that Plaintiff is disabled. *Id.* Here,
20 the ALJ declined to extend the disability finding of the VA under 20 CFR

1 404.1520b(c)(1) which provides that “decisions by other governmental agencies
2 are neither valuable or persuasive.” As this claim was filed after March 27, 2017,
3 the ALJ did not err in declining to give “great weight” to or superimpose the VA’s
4 findings of disability. Further, the ALJ stated that the evidence supporting the
5 VA’s findings was incorporated in the overall five step analysis. Tr. 33.

6 *B. Sara Stewart, ARNP*

7 Sara Stewart, ARNP, examined Plaintiff in connection to his disability
8 benefits determination at the VA. ECF No. 4 at 912-29. As a result of an in-
9 person examination and review of Plaintiff’s records, Stewart made findings that
10 Plaintiff would miss work 3-4 weeks per year due to sinus infections and that he
11 would leave work early six times per month due to sinus headaches. ECF No. 4 at
12 920. Additionally, she made a finding that Plaintiff suffered with sleep apnea and
13 “has not been able to work since 10/2020 due to extreme daytime fatigue due to
14 only sleeping 2-3 hours a night.” ECF No. 4 at 923. As part of her examination
15 regarding sleep apnea, Stewart noted that plaintiff described his restless sleep
16 resulting in only 2-3 hours of sleep per night and referred to the sleep study
17 conducted in 2016. *Id.* at 928, 929.

18 Plaintiff asserts that the ALJ improperly rejected Stewart’s findings because
19 a sleep apnea test is “objective evidence” and “[i]t is also logical that a person
20 cannot function in the workplace with only 2-3 hours of sleep each night.” ECF

1 No. 5 at 11-12. Additionally, Plaintiff argues that the ALJ erroneously gave more
2 weight to physicians that have never interacted with Plaintiff, while dismissing the
3 findings of Stewart because she was not actively treating for sleep related
4 disorders. *Id.* at 12. Finally, the Plaintiff objects to the ALJ’s analysis of
5 Plaintiff’s removal of his CPAP device, asserting that the ALJ should have
6 considered that he suffers from anxiety and claustrophobia in determine whether
7 noncompliance with treatment is a contributing factor to Plaintiff’s fatigue for
8 purposes of determining disability. *Id.*

9 The ALJ conducted a proper analysis as set out by 20 CFR § 404.1520c and
10 thus finding Stewart’s medical source statements to be unpersuasive was not
11 improper. As Plaintiff’s alleged onset date was October 1, 2020, the new
12 regulations for how an ALJ must evaluate medical opinion evidence under Titles II
13 is controlling. *See* 20 C.F.R. § 404.1520c. Here, the ALJ rejected the evidence
14 provided from Stewart’s examination because it was “speculative in nature and
15 [did] not provide clear, objective statements in support of these absences,” and
16 therefore lacked “necessary support with objective medical evidence and are
17 similarly inconsistent with the objective medical records.” Tr. 35. Specifically,
18 the ALJ noted that sinusitis is reasonably treated with medication, that the
19 statements made about Plaintiff’s fatigue were derived from interviewing Plaintiff,
20 not an objective source, and that Stewart’s report does not mention non-

1 compliance with the CPAP device to aid in sleep. *Id.*

2 Plaintiff takes issue with the ALJ's disregard of Stewart's mention of the
3 2016 sleep study in her examination of Plaintiff on July 28, 2021. However, the
4 record does not reflect that Stewart was involved in the study, and she instead
5 reviewed it as part of her overall review of Plaintiff's condition. Further, she was
6 not Plaintiff's medical provider for disordered sleep treatment. In reviewing the
7 record as set forth, the ALJ was justified in finding, as an examining medical
8 opinion, Stewart lacked the long-term exposure to properly assess Plaintiff's
9 limitations related to sleep disorders.

10 Plaintiff also contends that the ALJ, in rejecting Stewart's analysis of
11 Plaintiff's fatigue related limitations, improperly did not mention why Plaintiff
12 removes his CPAP at night. ECF No. 5 at 12. In her finding, Stewart notes that
13 Plaintiff sleeps 2-3 hours per night due to constant awakening from, among other
14 things, PTSD, anxiety, and claustrophobia from his CPAP machine. ECF No. 4 at
15 922.

16 A claimant's course of treatment and any other measures taken to relieve
17 symptoms are relevant factor in considering the severity of symptom allegations.
18 20 C.F.R. §§ 404.1529(c)(3); see also *Tommasetti v. Astrue*, 533 F.3d 1035, 1040
19 (9th Cir. 2008) (recognizing that a favorable response to treatment can undermine a
20 claimant's complaints of debilitating pain or other severe limitations). A

1 claimant's "unexplained, or inadequately explained, failure to seek treatment or
 2 follow a prescribed course of treatment" can undermine symptoms reports. *Fair v.*
 3 *Bowen*, 885 F.2d 597, 603-04 (9th Cir. 1989).

4 Plaintiff argues that, because he has presented a good reason for not
 5 complying with noted treatment for his condition, the ALJ should not take
 6 noncompliance into account. *Id.*; *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir.
 7 1996). However, the ALJ offered specific and clear reasons for discounting
 8 Plaintiff's fatigue and Stewart's analysis, including that in his testimony before the
 9 ALJ, Plaintiff had denied taking naps during the day, that other aid has been
 10 offered to Plaintiff for his sleep disorders, and that, because Stewart's analysis is
 11 predicated upon a review of records and Plaintiff's own self-reports, she lacked the
 12 longevity and in-depth time with Plaintiff to opine on his sleep-related disorders.
 13 Tr. 31, 35; *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001); *Morgan v.*
 14 *Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 602 (9th Cir. 1999); *Fair*, 885 F.2d at
 15 604 (supporting the conclusion that a physician's opinion may be rejected if based on
 16 a claimant's subjective complaints which were properly discounted).

17 The ALJ did not err in concluding that the Stewart's findings are not
 18 persuasive given that they were not supported by or and consist with the record as
 19 a whole as set out by the framework of 20 C.F.R. § 404.1520c(b)(2).

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1 *C. Dr. Marie Carmel Desire*

2 Dr. Desire conducted a PTSD assessment for VA disability benefits on July
3 5, 2021, and ultimately found that Plaintiff has occupational and social
4 impairments with reduced reliability and productivity. ECF No. 4 at 882. Dr.
5 Desire based this finding on Plaintiff's examination in which he described
6 traumatic events of witnessing an aircraft crash in 1994, killing close friends, as
7 well as events surrounding a relief mission in 1992 after Hurricane Andrew. *Id.* at
8 884. During his examination, Plaintiff noted that he experiences "intrusive
9 thoughts, flashbacks, nightmares, sleep trouble, anxiety, panic attacks, depressed
10 mood, avoidance, hypervigilance, [and] easy startling," as well as the occasional
11 "mood activation." *Id.* at 883. Dr. Desire also noted treatment conducted by Dr.
12 Farrukh Hashmi, who had seen Plaintiff on five separate occasions, and his
13 diagnosis of bipolar disorder, hypersomnia, narcolepsy, and PTSD. *Id.*

14 Plaintiff argues that the ALJ did not credit the entire report done by Dr.
15 Desire in the PTSD assessment, and that the ALJ did not consider Dr. Hashmi's
16 findings. ECF No. 5 at 14. According to Plaintiff, the ALJ should have taken into
17 account that Plaintiff satisfied the PTSD "diagnostic criteria," which includes the
18 presence of intrusion symptoms associated with traumatic events, persistent
19 avoidance of stimuli, negative alterations in cognitions and mood, and reactivity.
20 ECF No. 5 at 14, ECF No. 4 at 892. Additionally, Plaintiff argues the ALJ was in

1 error by failing to mention Dr. Hashmi's report, which indicated that Plaintiff had
2 been diagnosed with bipolar disorder and PTSD. ECF No. 5 at 14, ECF No. 4 at
3 465.

4 However, the ALJ's findings took into account Plaintiff's mental health
5 related limitations, requiring the Plaintiff able to "adapt to simple, routine changes
6 in the work setting. Interactions with the public and coworkers must be brief and
7 superficial, meaning non-collaborative interactions." Tr. 28. Defendant notes that
8 because Dr. Desire's assessment is devoid of any vocational-related language as to
9 how Plaintiff would be impaired in the workplace, the ALJ may treat the findings
10 as "other medical evidence." ECF No. 10 at 7, 20 C.F.R. § 404.1513(a)(3). The
11 Court agrees. Similar to the findings of Dr. Nand, the ALJ found that Dr. Desire's
12 medical opinion to be unpersuasive as it reached conclusory results because it did
13 not provide any functional analysis of Plaintiff's limits. *Id.* Dr. Desire's report
14 lists various symptoms, and ultimately made a findings of PTSD, but the Court
15 concurs that it lacks an overall vocational element to be persuasive in the ALJ's
16 findings. ECF No. 4 at 886.

17 Additionally, the ALJ did incorporate in Plaintiff's overall residual
18 functional capacity the reports of Dr. Hashmi, determining that the results were
19 consistent with the findings of psychological analysis performed during Plaintiff's
20 application for disability. Tr. 33-4.

1 Therefore, the ALJ was not in error in the amount of consideration given to
2 the opinions of Dr. Desire and Dr. Hashmi.

3 *D. Nurse Practitioner Johnny Liner and Physical Therapist Rod Strom*

4 Johnny Liner, a nurse practitioner, conducted an examination for VA disability
5 benefits on July 8, 2021. ECF No. 4 at 889. As part of the examination, Liner
6 reviewed records and gave an in-person examination to determine that Plaintiff's
7 back pain and prior injury would impact his ability to perform any type of
8 occupational task. ECF No. 4 at 906. Specifically, Liner found that Plaintiff
9 experienced lumbar and thoracic weakness, stiffness, would require frequent
10 repositioning when sitting, and is unable to tolerate sustained standing with needed
11 time to sit and rest. ECF No. 4 at 897-8.

12 Additionally, Rod Strom, a physical therapist, conducted a physical
13 examination of Plaintiff on November 15, 2021. ECF No. 4 at 762. In his
14 determination, Strom found that Plaintiff was able to perform light work on a full-
15 time basis but noted that he would shift from side to side while sitting and needed
16 to stand intermittently. *Id* at 763. Strom ultimately concluded that Plaintiff was
17 able to sit for 30 minutes at a time each without restriction, around 3 hours in an 8-
18 hour day; Plaintiff was able to stand for 30 minutes at a time without restriction,
19 around 4 hours in an 8-hour day; and Plaintiff was able to walk 20 minutes at a
20 time without restriction, around 4 hours in an 8-hour day. ECF No. 4 at 761. In

1 total, Strom found that plaintiff can sit/stand/walk without restriction for 8 hours in
2 an 8-hour day. *Id.*

3 Additionally, Plaintiff was found to have dexterity functional for daily use,
4 but that he fell below average (3rd to 26th percentile) and thus would not be
5 “competitive in a fast pace working environment requiring the rapid manipulation
6 of small parts.” *Id.*

7 Plaintiff argues that the ALJ did not take the sit/stand limitation or below
8 average dexterity into account when determining that Plaintiff can perform light
9 work. And, that the ALJ failed to mention mental health and pain symptoms. ECF
10 No. 5 at 18.

11 However, the ALJ properly took into account the findings of both Liner and
12 Strom in deciding limitations Plaintiff would face in performing work. The ALJ’s
13 finding that Plaintiff is able to perform light work is supported by the vocational
14 nature of both examinations, and the ALJ’s determination that the assessments
15 were consistent with the record as whole. Tr. 32. As to the dexterity issue, the
16 ALJ’s finding made no indication that Plaintiff should be required to perform work
17 that requires a fast-paced environment that deals with the manipulation of small
18 parts.

19 Therefore, the ALJ did not err in weighing the assessment of either Strom or
20 Liner, and properly incorporated them within the record as a whole.

1 **II. The ALJ's RFC findings**

2 Plaintiff takes issue with the ALJ's finding that Plaintiff has a residual
3 functional capacity to perform light work, such as what is defined in 20 C.F.R.
4 404.1567(b). Tr. 28, ECF No. 5 at 20. Plaintiff asserts that the ALJ did not
5 consider the entire record as whole when making an RFC determination, including
6 PTSD, Bipolar Disorder, Sleep Disorders, and back pain. ECF No. 5 at 20.
7 Further, Plaintiff argues that ALJ's reliance on a seemingly waning of symptoms in
8 the finding of Plaintiff's RFC was improper.

9 However, as noted above, the ALJ did in fact account for the entire record
10 and made an appropriate RFC finding that reflected Plaintiff's abilities given his
11 documented limitations. Specifically, the ALJ found:

12 After careful consideration of the entire record, the undersigned finds
13 that the claimant has the residual functional capacity to perform light
14 work as defined in 20 CFR 404.1567(b) except he can perform postural
15 activities occasionally but can never climb ladders, ropes, or scaffolds.
16 He must avoid all hazards, such as unprotected heights. He is able to
17 understand, remember, and carry out simple, routine tasks and
instructions and can maintain concentration, persistence and pace for
those tasks for two-hour intervals between regularly scheduled breaks.
He can adapt to simple, routine changes in the work setting. Interaction
with the public and coworkers must be brief and superficial, meaning
non-collaborative interactions.

18 Tr. 28.

19 The Court finds that the ALJ's determination is well supported and reflected
20 in the record. Plaintiff contends that the finding does not reflect his mental health

1 history, sleep disorders, or his physical symptoms surrounding back pain.
2 However, the ALJ systematically engaged in the two-step process required to
3 determine whether the Plaintiff is disabled. SSR 16-3p, 2016 WL 1119029, at *2.
4 “First, the ALJ must determine whether there is ‘objective medical evidence of an
5 underlying impairment which could reasonably be expected to produce the pain or
6 other symptoms alleged.’” *Molina*, 674 F.3d at 1112 (quoting *Vasquez v. Astrue*,
7 572 F.3d 586, 591 (9th Cir. 2009)). “The claimant is not required to show that [the
8 claimant’s] impairment ‘could reasonably be expected to cause the severity of the
9 symptom [the claimant] has alleged; [the claimant] need only show that it could
10 reasonably have caused some degree of the symptom.’” *Vasquez*, 572 F.3d at 591
11 (quoting *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007)).

12 The ALJ made a detailed analysis of Plaintiff’s backpain, including the
13 functional analysis as detailed above, and included discussion of his abilities to
14 perform work-related activities given his pain. Tr. 30. In support of this finding,
15 the ALJ cited to, among other pieces of evidence, record produced for the VA’s
16 disability determination, the examination conducted by Johnny Liner, and reports
17 from physical therapy. *Id.* Together with the functional capacity evaluation
18 conducted in 2021, the ALJ determined that the level of limitation expressed by
19 Plaintiff was not consistent with the record overall. *Id* at 32.

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1 The ALJ also gave a detailed discussion of Plaintiff's sleep disorders,
2 including a brief aside about Plaintiff's hostility when told that controlled
3 substances could not be prescribed for sleep assistance, and his non-compliant use
4 of his prescribed CPAP device. Tr. 31. The Court agrees that non-compliance
5 with prescribed sleep aids undercuts the alleged severity of Plaintiff's symptoms.

6 Finally, the ALJ included record support in discussing Plaintiff's mental
7 impairments. *Id.* Specifically, the ALJ determined that Plaintiff's depression and
8 PTSD is being managed in counseling, and that Plaintiff had been prescribed
9 medication which was only taken sporadically. *Id.* Further, the ALJ found that
10 Plaintiff has continued to deny depressive episodes and is able to maintain daily
11 life. *Id.*

12 **Conclusion**

13 Having reviewed the record and the findings of the ALJ, the Court concludes
14 that there was no error in the ALJ's decision.

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1 **ACCORDINGLY, IT IS HEREBY ORDERED:**

2 1. Plaintiff's Opening Brief (ECF No. 5) is **DENIED**.
3 2. Defendant's Response Brief (ECF 10) is **GRANTED**. The final decision
4 of the Commissioner is **AFFIRMED**.

5 The District Court Executive is directed to enter this Order and Judgment
6 accordingly, furnish copies to counsel, and **CLOSE** the file.

7 DATED November 3, 2023.



8 A handwritten signature in blue ink that reads "Thomas O. Rice".
9 THOMAS O. RICE
10 United States District Judge